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FEDERAL COMMUNICATIONS COMMISSION
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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution and Carriage	)	MM Docket No. 92-265

COMMENTS OF TIME WARNER ENTERTAINMENT COMPANY, L.P.

January 25, 1993

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Summary

TWE submits that the Commission should promulgate regulations that:

I. PROGRAM-ACCESS ISSUES

A. General Program-Access Issues.

- recognize that liability cannot be imposed under § 628(b) unless (1) an unfair practice has been committed and (2) the unfair practice significantly hinders a complainant's ability to deliver programming to its subscribers;
- define "unfair practices" so as to encompass only conduct resulting from the incentives caused by vertical integration and permit vertically integrated programming vendors to engage in practices also engaged in by independent programming vendors;
- establish a "hinder significantly" standard that requires a complainant to demonstrate that the unfair act of which it complains would jeopardize the competitive viability of a well-run distributor serving the geographical area in which the complainant is active;
- focus on the geographical area in which a particular complainant competes;
- exempt from § 628 programming services that have no more than a de minimis effect on the competitive viability of distributors;

B. The Specific Provisions of § 628.

1. Section 628(c)(2)(A).

- recognize that this section applies only if a cable operator influences a programming vendor with which it itself is affiliated;

- require complainants to demonstrate that an actual communication occurred between a cable operator and programming vendor in an effort to exert influence and that the influence exerted resulted in a decision that would not be in the programming vendor's independent self-interest;

2. Section 628(c)(2)(B).

- define "discrimination" so as to proscribe only disparate treatment of similarly situated distributors;

- recognize that a distributor is not similarly situated if a programming vendor sells it a product that is different from the product that it sells to other distributors, or if the distributor has marketing abilities that are different from those of other distributors;

- permit programming vendors, where they deem this necessary, to impose different terms on distributors to protect against underreporting; to ensure signal and service quality; and to ensure timely payment;

- permit programming vendors to take into account differences in "cost of sale" attributable to differences in transaction costs;

- recognize that "cost of sale" differences include programming vendors' costs in marketing their product to subscribers;

- permit programming vendors to account for differences in distributors' costs;

- recognize that delivery of encrypted programming to home satellite dish (HSD) subscribers is more expensive than delivery to the headend of a cable system;

- permit programming vendors to charge lower rates to distributors serving greater numbers of subscribers even if such discounts do not reflect specific cost differences;

- establish three "bands" (irrebuttably reasonable, rebuttably reasonable, rebuttably unreasonable) in order to separate justified price differentials from discrimination;

- establish a band in which price differentials of 15% over or below the midpoint are irrebuttably presumed reasonable;

- impose requirements on buying groups that will ensure that they behave like single entities;

- apply § 628(c)(2)(B) prospectively so as to prohibit programming vendors from discriminating only with respect to "contracting" for the sale of programming and not with respect to delivery of programming services under existing agreements; and so as to preclude distributors from basing discrimination claims upon contracts that predate the Commission's rules;

3. <u>Sections 628(c)(2)(C) and (D).</u>

- define an "area served" as an area passed by cable, with an "area" encompassing the entire territory of a political subdivision having the authority to franchise;

- permit programming vendors to utilize sub-distribution agreements and otherwise proscribe only such practices that "prevent" distributors from "obtaining" programming in areas not served by cable;

- recognize that Congress did not impose upon programming vendors a duty to deal with distributors in uncabled areas;

- assess the validity of an exclusive contract in an area served by cable through the complaint process and establish rules identifying the circumstances in which exclusive arrangements are _per se_ valid;

- establish that exclusive arrangements offered by new programming services are _per se_ valid for a period of ten years;

C. Enforcement.

- permit programming vendors 30 days to answer complaints under § 628;

- require complainants to come forth with affirmative evidence in order to make out a _prima facie_ case, including evidence sufficient to satisfy the "hinder significantly" requirement;

- permit complainants to take discovery only when they have made a particular showing of need and provide for discovery orders that will specify the permissible scope of discovery;

- recognize that the forfeiture remedy should only be used in extraordinary cases, such as wilful or repeated violations;

D. Other Programming-Distribution Issues.

- interpret § 628(c)(3)(A) to create an exception for programming vendors, not distributors, and read this provision to permit programming vendors to black out programming in areas for which they have not obtained exhibition rights;

- sanction as frivolous parties that file a complaint that fails to make out a _prima facie_ showing or that is not well grounded in fact or law;

- award sanctions equivalent to the expenses incurred as a result of the filing;

II. PROGRAM-CARRIAGE ISSUES

- delay the rulemaking under § 616 until after the rulemaking under § 628 is completed.

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COMMENTS OF TIME WARNER ENTERTAINMENT COMPANY, L.P.

Preliminary Statement

Time Warner Entertainment Company, L.P. ("TWE"), is majority owned and fully managed by Time Warner Inc. ("TWI"), a publicly traded company. TWE consists principally of three unincorporated divisions: Time Warner Cable ("TWC"), which operates cable systems; Home Box Office ("HBO"), which wholly owns two pay-television services (the HBO Service and Cinemax), and is 50% owner of one basic service (Comedy Central); and Warner Bros., which produces and distributes motion pictures and television programs. TWE and TWI also directly and indirectly hold minority interests in various basic cable programming services other than those owned by HBO.

TWE submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") adopted December 10, 1992, and released December 24, 1992, regarding its rule-making responsibilities under §§ 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), which add §§ 616 and 628, respectively, to the Communications Act of 1934, 47 U.S.C. §§ 536, 548.

TWE is the plaintiff in a lawsuit pending in Federal District Court in Washington, D.C., in which it takes the position that § 19 and other provisions of the 1992 Cable Act violate its rights under the First Amendment to the United States Constitution. See Time Warner Entertainment Company, L.P. v. FCC, Civil Action No. 92-2494 (D.D.C. filed Nov. 5, 1992). TWE submits these comments without prejudice to its claims and arguments in that lawsuit.

I. PROGRAM-ACCESS ISSUES

A. General Program-Access Issues in § 628 of the Communication Act.

The Commission invites general comments on Congress's objectives in enacting § 628. NPRM ¶ 6. The immediate purposes that Congress sought to serve are set out in § 628(a):

> (a) to "increas[e] competition and diversity in the multichannel video programming market";
>
> (b) "to increase the availability of satellite cable programming . . . to persons in rural and other areas not currently able to receive such programming"; and
>
> (c) "to spur the development of communications technologies".

Section 628, which regulates the conduct only of vertically integrated programming vendors and cable operators, must further be considered in light of Congress's more general findings in § 2(a)(5) of the 1992 Cable Act that "[v]ertically integrated program suppliers . . . have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies".

It is clear that Congress did not perceive vertical integration to be an evil in itself. Both the House and Senate Reports recognized that integration between cable operators and programming vendors can be beneficial. See H.R. Rep. No. 628, 102d Cong., 2d Sess. 41 (1992); S. Rep. No. 92, 102d Cong., 1st Sess. 26 (1991) (hereinafter "S. Rep."). The Commission and the NTIA had earlier recognized the same. See Federal Communications Commission, Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd. 4962, 5009-10 (1990); U.S. Dep't of Commerce, Video

Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-233 102 (1988) (hereinafter "1988 NTIA Report"). Indeed, more generally, it is well established that vertical integration, without more, is not a threat to competition. 1/

However, Congress feared that control over programming could be used, and was being used, to stifle the emergence of competition to cable from alternative technologies. 2/ In enacting § 628, Congress sought to foster competition with cable by ensuring that vertically integrated programming vendors and cable operators would not prevent alternative distributors from having access to the programming that they claimed to need to compete.

1. Structure of § 628(b).

Section 628(b) makes it

> "unlawful for a . . . satellite cable programming vendor in which a cable operator has an attributable interest . . . to engage in unfair methods of competition or unfair or deceptive acts or practices,

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1/ Cf. United States v. Columbia Steel Co., 334 U.S. 495, 525 (1948) (vertical integration in itself does not violate Sherman Act); Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 710 (7th Cir.) ("[v]ertical integration is a universal feature of economic life and it would be absurd to make it a suspect category under the antitrust laws"), cert. denied, 469 U.S. 1018 (1984).

2/ That is, alternative to incumbent cable operators: overbuilders, private cable (SMATV) systems, wireless cable (MDS and MMDS) systems, home satellite dish (HSD) packagers, and direct broadcasting satellite (DBS) operators.

> the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers".

The Commission suggests that there can be no violation of § 628(b) unless (1) the defendant committed an unfair practice, and (2) this unfair practice could significantly hinder distributors in providing programming to subscribers. NPRM ¶ 10. 3/

TWE agrees that the language of § 628(b) requires this reading. That section establishes that two requirements must be satisfied for conduct to be unlawful. First, the conduct must amount to "unfair methods of competition or unfair or deceptive acts or practices" (below, TWE will refer to such conduct as "unfair practices"). Second, "the purpose or effect" of the unfair practices must be to "hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers". Besides being textually distinct, these two prongs are also analytically distinct: The unfair-practices prong focuses on the nature of the conduct of the defendant,

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3/ Of course, if there is no violation of § 628(b), there can be no violation of § 628 at all, because § 628(c) empowers the Commission to prescribe regulations only to "specify conduct that is prohibited by subsection (b)".

while the hinder-significantly prong focuses on the effect of that conduct.

2. "Unfair Practices".

Section 628(c)(1) empowers the Commission to "prescribe regulations to specify particular conduct that is prohibited by subsection (b)". TWE submits that this section empowers the Commission to promulgate rules saying that certain conduct constitutes "unfair methods of competition or unfair or deceptive acts or practices".

The "unfair practices" phrase is not defined in the Communications Act. However, the Commission correctly observes that "the proscriptions pertaining to satellite cable programming vendors [set forth in § 628] are apparently focused on practices that are pursued by vertically integrated entities". NPRM ¶ 8. Section 628(c)(2)(A)-(D), arguably § 628's most important provisions, apply only to vertically integrated satellite cable programming vendors.

The Commission suggests that § 628 should therefore not cover "conduct beyond actions that are related to discriminatory incentives caused by vertical integration". NPRM ¶ 8. TWE agrees. In enacting § 628, Congress intended to prevent vertical integration from being used to stifle competition with cable. The language of

§ 628(c)(1) makes clear that the Commission must identify unfair practices in light of the concerns underlying § 628. 4/ Accordingly, the Commission should not hold the conduct of a vertically integrated programming vendor to be an unfair practice unless the programming vendor acts on incentives resulting from it being vertically integrated with a cable operator. Two things follow from this:

First, a distributor has no ground to complain unless a programming vendor has acted on incentives resulting from vertical integration. The Commission suggests that its prohibitions should apply only in "local markets where an entity is in fact vertically integrated, *i.e.*, where it holds an attributable interest in the local cable system". NPRM ¶ 11. TWE agrees. Where that is not the case, the programming vendor has no incentive resulting from vertical integration to withhold programming from any distributor. To the contrary, it has an incentive to sell as much programming as it can. 5/

4/ See 628(c)(1) ("in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies").

5/ At a minimum, the Commission should require a distributor to show that the defendant is in a position to have an incentive resulting from vertical integration. Thus, a distributor (say, an MMDS operator) must establish that the defendant programming vendor is vertically

Second, any practice of a kind engaged in by independent programming vendors cannot be "unfair" because independents, by definition, lack incentives related to vertical integration. 6/ Accordingly, the Commission should permit vertically integrated programming vendors to engage in practices also engaged in by independents. For example, if independents use a certain kind of pricing structure, that should demonstrate to the Commission that such a pricing structure has nothing to do with incentives resulting from vertical integration, and the Commission

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integrated with a cable operator with whom the complainant distributor actually competes.

A complainant might be able to carry its burden by showing that it competes in some but not all geographic areas that it serves with a cable operator that is vertically integrated with the defendant. For example, a vertically integrated programming vendor could theoretically have an incentive to discriminate against an HSD packager serving both cabled and uncabled areas if one of the cable operators in the cabled areas is vertically integrated with the programming vendor.

6/ Indeed, nothing in § 628 can be read to regulate the conduct of independent programming vendors. Clearly, then, the conduct of independent programming vendors was not of concern to Congress, because, if it would have been, Congress no doubt would have swept independent programmers within the scope of the prohibitions of § 628. Accordingly, whether a kind of practice is engaged in by independent programming vendors is a good yardstick for determining whether that kind of practice is "unfair" for purposes of § 628.

should therefore allow vertically integrated programming vendors to use it. 7/

3. "Hinder Significantly".

The second prong of § 628(b) requires that a complainant show that the purpose or effect of the unfair practice was to "hinder significantly or to prevent any . . . distributor from providing . . . programming to subscribers or consumers". TWE submits that the Commission should focus on "hinder significantly" rather than "prevent", because an unfair practice that "prevents" will automatically also "hinder significantly" (the converse is not true). TWE further makes two observations with respect to the quoted language.

First, for the "hinder significantly" requirement to be satisfied, it is not enough that a particular distributor be able to show that the unfair practice caused it significant hindrance in delivering the defendant's programming service to consumers. Rather, the unfair practice must cause the distributor significant hindrance in delivering "programming", that is to say, any programming at

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7/ Section 628(f)(1) empowers the Commission to "establish procedures . . . to collect such data . . . as the Commission requires to carry out this section". Nothing in this section suggests that the Commission would not have the power to obtain information from independents.

all. 8/ Put differently, a complainant must show that the unfair practice jeopardized the distributor's competitive viability.

Second, for the "hinder significantly" requirement to be satisfied, it is not enough that a particular distributor be able to show that the unfair practice jeopardized its competitive viability. There may be many reasons why a particular distributor's competitive viability is in danger wholly independent from any unfair practice (for one thing, the distributor may be poorly run). The

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8/ If Congress would have intended to refer to hindrance in the delivery of merely one particular service, it would have said "such programming", as it did in § 628(c)(2)(C). That section prohibits certain "exclusive contracts for satellite cable programming . . . between a cable operator and a satellite cable programming vendor", but only if those contracts "prevent a . . . distributor from obtaining such programming". TWE submits that "such" refers back to the "programming" in "contracts for satellite cable programming", and that "such programming" therefore refers to the programming service sold by a particular defendant. See infra note 33.

In § 628(b), the word "such" before "programming" is omitted. TWE submits that a complainant must therefore show that an unfair act significantly hindered the complainant in providing any programming to consumers at all, that is to say, destroyed its viability as a competitor.

This reading finds support in another difference between § 628(b) and § 628(c)(2)(C). The latter subsection speaks of "obtaining" programming, whereas the former says "providing" programming. TWE submits that § 628(c)(2)(C) focuses on the relationship between a distributor and a programming vendor, whereas § 628(b) focuses on the relationship between a distributor and its subscribers.

statute, however, seeks to protect competition rather than competitors. An unfair practice is unlawful only if the unfair practice would hinder significantly the provision of programming by "any multichannel video programming distributor", not just the complainant. Thus, the Commission's hinder-significantly test should turn on whether the unfair practice would endanger the competitive viability of a well-run distributor, not whether it would endanger the competitive viability of the particular complainant.

The Commission asks what geographic market is relevant in evaluating whether an unfair practice "hinders significantly". NPRM ¶ 11. From the definition of "hinder significantly" that TWE proposes, it follows that the Commission should focus on the geographical market or markets in which a particular complainant competes. Cf. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 331-33 (1961) (relevant geographical market is the area in which producers compete). For example, if the complainant in a given adjudication under § 628 is an MMDS operator operating a single MMDS system, the Commission should consider whether the unfair practice of which the MMDS operator complains would endanger the competitive viability of a well-run MMDS operator in the complainant's geographical market.

The Commission asks whether it should exclude from its prohibitions programming vendors that lack significant anticompetitive potential because they have only a small market share. NPRM ¶ 11. Without getting into a debate about the proper definition of "market", TWE agrees that the Commission should exempt such services. It is clear that § 628 was aimed at popular and widely distributed programming services such as the HBO Service, Showtime, TNT and CNN. See, e.g., S. Rep. 14, 24. Only a distributor's failure to obtain such services could possibly affect its competitive position. 9/ No distributor could credibly claim that its failure to obtain, say, Court TV, Comedy Central, or Cinemax, would endanger its competitive viability. TWE therefore proposes that the Commission create safe harbors, which for basic services should be tied to a service's Nielsen rating, and for pay services should be tied to a service's penetration (subscribers per basic subscribers).

9/ Different distributors often have a substantially different programming line-up. TWE therefore does not believe that a distributor's failure to obtain any one particular service or small number of services could jeopardize its competitive viability. However that may be, TWE believes that it would be truly impossible for anyone to argue that a distributor's inability to obtain fledgling services or services with little distribution causes any competitive harm.

B. Specific Provisions of § 628.

The Commission asks whether Congress intended it to identify unfair practices beyond those specified in § 628(c)(2). NPRM ¶ 13 n.32. TWE submits that, even assuming Congress gave the Commission the power to do this, the Commission should not now exercise it. There is not so much as a hint in the legislative history that Congress thought of other practices as unfair, and that it intended the Commission to address them. Moreover, there is every reason to give the rules promulgated under § 628(c)(2)(A)-(D) time to work. If those rules fail to effectuate the objectives that Congress sought to serve in enacting § 628, there will be time enough for the Commission to address other unfair practices.

Specifically, the Commission asks whether it should identify as unfair practices under § 628(c)(1) conduct that is already unlawful under the antitrust laws. NPRM ¶ 13 n.32. TWE submits that this would be unnecessary. Those practices are already unlawful, and anyone wishing to complain of them can turn to enforcement agencies or the courts. There is nothing in the legislative history showing that Congress thought that the antitrust laws need an additional level of enforcement.

1. "Undue Influence" in Programming Distribution.

The Commission invites comment on the proper interpretation of § 628(c)(2)(A), NPRM ¶ 14, which requires it to

> "establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor . . . from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming . . . to any unaffiliated multichannel video programming distributor".

At the outset, TWE observes that the practical significance of § 628(c)(2)(A) will likely be slight. Discrimination by a vertically integrated programming vendor is already restrained by § 628(c)(2)(B) without a specific showing of its affiliated cable operator exercising influence. Thus, § 628(c)(2)(A) has a role to play only if a programming vendor because of an affiliated cable operator's "undue influence" either (a) refuses to sell 10/ ; or (b) requires a price or term that, although not "discriminatory" for purposes of § 628(c)(2)(B), is different from the price or term that it would have required absent any influence. 11/

10/ Section 628(c)(2)(B) does not impose a duty to sell.

11/ Moreover, it is unlikely that a distributor complaining of discrimination that is permissible under § 628(c)(2)(B) could ever satisfy the hinder-significantly test.

Moreover, because § 628(c)(2)(A) says "such vendor", it applies only if a cable operator influences a programming vendor with which it itself is affiliated. It is not a violation for a cable operator that has an attributable interest in one programming vendor to influence another programming vendor in which it has no attributable interest. For example, any complaint that TWC unduly influenced the Discovery Channel falls outside the scope of this provision. 12/ The exercise of such influence presents no greater threat than the exercise of influence by a non-vertically integrated operator, which is clearly beyond the scope of § 628(c)(2)(A). 13/

The Commission invites comment on the proper definition of "undue influence", on how it should distinguish undue influence from other contacts, and on how it should distinguish a cable operator's influence from a programming vendor's own decision making. NPRM ¶ 14. TWE submits that two tests must be satisfied for there to be "undue influence".

12/ Although TWC is "a cable operator" and has "an attributable interest in a satellite cable programming vendor" (HBO), it does not have such an interest in the Discovery Channel.

13/ Moreover, where there is a conspiracy between a cable operator and an unaffiliated programming vendor, the antitrust laws offer adequate redress.

First, there must be influence. If a programming vendor independently decides to favor an affiliated cable operator, there is no violation. (Such an independent decision may of course lead to a violation of § 628(c)(2)(B), but that is irrelevant to the question whether it also violates § 628(c)(2)(A).) Rather, the complainant must prove that an actual communication from a cable operator to a programming vendor took place in which the cable operator sought to persuade the programming vendor to change a sales-related decision. 14/

Second, the influence must be "undue" or "improper". Apparently, the statute contemplates that there can be influence that is "due" and "proper". Thus, not every communication from a cable operator to a programming vendor comes within § 628(c)(2)(A), not even if it influences the programming vendor's decision to sell or the price at which it sells. As explained more fully above, the Commission must identify "unfair practices" in light of the purpose of § 628, which generally seeks to make it unlawful for a programming vendor to act on incentives resulting from

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14/ And, the cable operator's attempt at persuasion must bear fruit for there to be a violation. If the programming vendor ignores the cable operator's plea, the unaffiliated distributor is not "hindered", let alone "significantly". Section 628 does not prohibit unsuccessful attempts.

vertical integration with a cable operator. See supra pp. 6-9. Accordingly, influence is not "undue" if it results in a decision by a programming vendor that would be in its self-interest even without its affiliation with a cable operator. 15/

2. Discrimination.

(a) Defining the Term "Discrimination".

The term "discrimination" in § 628(c)(2)(B) is not defined. However, in using that term, Congress did not write on a clean slate. The term is used in a variety of other federal statutes, and has in those contexts generally been interpreted to refer to disparate treatment of similarly situated individuals on a ground that the statute prohibits. See, e.g., Washington v. Lake County, 969 F.2d 250, 256 (7th Cir. 1992) (Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(1)-(2)); Mitchell v. Toledo Hosp., 964 F.2d 577, 582-83 (6th Cir. 1992) (same).

TWE submits that the same definition should apply under § 628(c)(2)(B), and that a distributor is not "similarly situated" if a programming vendor sells it a

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15/ One way of determining whether a communication crosses the line between permissible advice and improper arm twisting is to compare the programming vendor's ultimate sales decision with the sales decision of a similarly situated independent. If the decision is similar, the line has not been crossed.